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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

JOHN JOEY MARKS,

Petitioner,

v.

BRIAN WILLIAMS, *et al.*,

Respondents.

Case No. 2:17-cv-01413-JCM-PAL

ORDER

This action is a petition for writ of habeas corpus, pursuant to 28 U.S.C. § 2254, by John Joey Marks, a Nevada prisoner.

There are, before the Court, a motion to dismiss filed by the respondents, and a motion for stay filed by Marks. The Court will grant the motion for stay, and stay this action pending completion of Marks' ongoing state-court habeas litigation. The Court will deny as moot, and without prejudice, the motion to dismiss.

Marks was convicted, on July 2, 2015, upon a guilty plea in Nevada's Eighth Judicial District Court (Clark County), of robbery with use of a deadly weapon, and he was sentenced, as a habitual criminal, to 20 years in prison with parole eligibility after 8 years. See Judgment of Conviction, Exh. 7 (ECF No. 8-7); Judgment of Conviction, Exh. 10 (ECF No. 8-10). Marks did not pursue a direct appeal.

Marks initiated a state habeas action on March 30, 2016. See Petition for Writ of Habeas Corpus (Post-Conviction), Exh. 14 (ECF No. 8-14). The state district court denied

1 that petition. See Findings of Fact, Conclusions of Law and Order, Exh. 26 (ECF No. 8-
2 26). Marks appealed, and the Nevada Court of Appeals affirmed on November 18, 2016.
3 See Order of Affirmance, Exh. 32 (ECF No. 8-32).

4 Marks then initiated this federal habeas corpus action, *pro se*, on May 16, 2017.
5 See Petition for Writ of Habeas Corpus (ECF No. 4). The Court appointed counsel for
6 Marks (see Order entered June 1, 2017 (ECF No. 3)), and, with counsel, Marks filed a
7 first amended habeas petition on June 23, 2017 (ECF No. 7), and a second amended
8 habeas petition on February 28, 2018 (ECF No. 20).

9 On April 13, 2018, Marks initiated a second state habeas action. See Petition for
10 Writ of Habeas Corpus (Post-Conviction), Respondents' Exh. 46 (ECF No. 30-11). Marks
11 represents that the state district court denied that petition on August 20, 2018, and that
12 he intends to appeal from that ruling. See Motion for Stay (ECF No. 36), p. 3.

13 On August 13, 2018, the respondents filed a motion to dismiss (ECF No. 28),
14 contending that certain of the claims in Marks' second amended habeas petition are
15 unexhausted in state court.

16 Then, on August 29, 2018, Marks filed a motion for stay (ECF No. 36). In the motion
17 for stay, Marks concedes that, as set forth in his second amended petition and supported
18 with evidence not presented in his first state habeas action, certain of his claims are
19 unexhausted in state court.

20 On September 12, 2018, the respondents filed a notice of non-opposition to the
21 motion for stay (ECF No. 37), in which they state:

22 Respondents hereby submit this non-opposition to Marks' Motion. In
23 light of the pending litigation in the state court, Respondents agree that it
24 would be appropriate to stay the federal proceeding, permitting the state
25 courts to have the first opportunity to review the merits of Marks' claims.
See 28 U.S.C. § 2254(b)(1)(A) (precluding federal court from granting
petition for writ of habeas corpus unless petitioner has exhausted remedies
available in state court).

26 Notice of Non-Opposition to Motion for Stay and Abeyance (ECF No. 37), p. 1.
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1 In *Rhines v. Weber*, 544 U.S. 269 (2005), the United States Supreme Court
2 circumscribed the discretion of federal district courts to impose stays to facilitate habeas
3 petitioners' exhaustion of claims in state court. The *Rhines* Court stated:

4 [S]tay and abeyance should be available only in limited circumstances.
5 Because granting a stay effectively excuses a petitioner's failure to present
6 his claims first to the state courts, stay and abeyance is only appropriate
7 when the district court determines there was good cause for the petitioner's
8 failure to exhaust his claims first in state court. Moreover, even if a petitioner
9 had good cause for that failure, the district court would abuse its discretion
if it were to grant him a stay when his unexhausted claims are plainly
meritless. Cf. 28 U.S.C. § 2254(b)(2) ("An application for a writ of habeas
corpus may be denied on the merits, notwithstanding the failure of the
applicant to exhaust the remedies available in the courts of the State").

10 * * *

11 [I]t likely would be an abuse of discretion for a district court to deny a stay
12 and to dismiss a mixed petition if the petitioner had good cause for his failure
13 to exhaust, his unexhausted claims are potentially meritorious, and there is
no indication that the petitioner engaged in intentionally dilatory litigation
tactics. In such circumstances, the district court should stay, rather than
dismiss, the mixed petition.

14 *Rhines*, 544 U.S. at 277-78. Later, in the context of the procedural default doctrine, the
15 Supreme Court held:

16 [W]hen a State requires a prisoner to raise an ineffective assistance of trial
17 counsel claim in a collateral proceeding, a prisoner may establish cause for
18 a default of an ineffective assistance claim in two circumstances. The first
19 is where the state courts did not appoint counsel in the initial review
20 collateral proceeding for a claim of ineffective assistance at trial. The
second is where appointed counsel in the initial review collateral
proceeding, where the claim should have been raised, was ineffective under
the standards of *Strickland v. Washington*, 466 U.S. 668 (1984).

21 *Martinez v. Ryan*, 132 S.Ct. 1309, 1318 (2012). The Ninth Circuit Court of Appeals has
22 applied *Martinez* to the showing of good cause required for exhaustion stays under
23 *Rhines*. "[W]e hold that the *Rhines* standard for [ineffective assistance of counsel] based
24 cause is not any more demanding than the cause standard articulated in *Martinez*." *Blake*
25 *v. Baker*, 745 F.3d 977, 984 (9th Cir. 2014); see also *Dixon v. Baker*, 847 F.3d 714, 721
26 (9th Cir. 2017) ("A petitioner who is without counsel in state postconviction proceedings
27 cannot be expected to understand the technical requirements of exhaustion and should
28

1 not be denied the opportunity to exhaust a potentially meritorious claim simply because
2 he lacked counsel.”).

3 Marks concedes that certain of his claims – Grounds 1, 2, 3, at least in part – are
4 unexhausted in state court, and he states that he is currently exhausting those claims in
5 his pending state habeas action. See Motion for Stay (ECF No. 36), pp. 7-9. Marks points
6 to his lack of counsel in his first state habeas action, and to alleged intellectual disability
7 and mental illness, as cause for his failure to previously exhaust his claims. See *id.* at 4-
8 6. Marks presents colorable argument that the unexhausted claims are at least potentially
9 meritorious. See *id.* at 7-9. There is no showing that Marks has engaged in intentionally
10 dilatory litigation tactics.

11 The Court finds that Marks has satisfied the standard under *Rhines* for a stay of
12 this action, and the Court will grant his motion for stay, and stay the action pending the
13 completion of his pending state-court habeas action. The court will deny, as moot, and
14 without prejudice, Respondents’ motion to dismiss.

15 In reaching these conclusions, the Court takes into consideration Respondents’
16 non-opposition to the motion for stay. See Notice of Non-Opposition to Motion for Stay
17 and Abeyance (ECF No. 37). The Court also takes into consideration Marks’
18 representations regarding the status of his state-court litigation. See Motion for Stay (ECF
19 No. 36), p. 3.

20 The court's intention is that this will be the last time that the Court imposes a stay
21 to facilitate Marks’ exhaustion of claims in state court. Marks must exhaust all his
22 unexhausted claims in state court during the stay imposed by this order.

23 **IT IS THEREFORE ORDERED** that Petitioner’s Motion for Stay and Abeyance
24 (ECF No. 36) is **GRANTED**. This action is stayed, while the petitioner exhausts, in state
25 court, his unexhausted claims for habeas corpus relief. The Clerk of the Court shall
26 administratively close this case.

27 **IT IS FURTHER ORDERED** that Respondents’ Motion to Dismiss (ECF No. 28) is
28 **DENIED**, as moot, and without prejudice.

IT IS FURTHER ORDERED that following the conclusion of Petitioner's state-court action, Petitioner must, within 30 days, make a motion to lift the stay of this action.

IT IS FURTHER ORDERED that this action will be subject to dismissal, upon a motion by Respondents, if Petitioner does not comply with the time limits in this order, or if he otherwise fails to proceed with diligence during the stay imposed by this order.

DATED September 19, 2018.

James C. Mahan
JAMES C. MAHAN,
UNITED STATES DISTRICT JUDGE